



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Parts 1 and 124**

**[EPA-HQ-OGC-2019-0406; FRL-10024-73-OA]**

**RIN 2090-AA41**

### **Revisions to the Permit Appeals Process to Restore the Organization and Function of the Environmental Appeals Board**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

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**SUMMARY:** The Environmental Protection Agency (EPA) is reversing recent changes to the organization and function of the Environmental Appeals Board (EAB) that altered the appeals process and procedures for Agency decisions that the EAB considers. In addition, the Administrator reaffirms that the Board is intended to function as an impartial body that is independent of all EPA components, except the immediate Office of the Administrator, and reaffirms the EAB's ability to carry out the Administrator's delegated authority to adjudicate disputes and issue final Agency decisions.

**DATES:** This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-HQ-OGC-2019-0406. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available

electronically through <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Ammie Roseman-Orr, Environmental Appeals Board (EAB), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Mail Code 1103M, Washington, DC 20460-0001; (202) 233-0122; e-mail address: *roseman-orr.ammie@epa.gov*.

## **SUPPLEMENTARY INFORMATION:**

### **I. General Information**

#### *A. Does This Action Apply to Me?*

This action affects the organization and function of the Environmental Appeals Board (EAB or Board) and the rules of practice governing administrative appeals. The rules of practice governing EAB appeals apply to any persons or entities who seek review of EPA final permit decisions under 40 CFR 124.19 by the EAB as well as persons or entities who appear before the Board in other matters.

#### *B. When Will This Rule Become Effective?*

This rule will become effective upon publication in the Federal Register. The Administrative Procedure Act's requirement, 5 U.S.C. 553(d), that substantive rules not be effective until at least 30 days after publication in the Federal Register is inapplicable because this rulemaking is procedural.

#### *C. What Is the Agency's Authority for Taking This Action?*

EPA is issuing this document under its general rulemaking authority, 5 U.S.C. 301, which provides that “[t]he head of an Executive department or military department may prescribe regulations for the government of this department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.” EPA is not one of the 15 “Executive Departments” listed at 5 U.S.C. 101, however,

EPA gained housekeeping authority through the Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (July 9, 1970).

EPA's authority to issue this procedural rule is also contained in the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; and Clean Air Act, 42 U.S.C. 1857 *et seq.* This rule does not expand the Board's authority beyond that of the Administrator in reviewing agency decisionmaking and making final agency determinations.

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b) (A), provides that "rules of agency organization, procedure, or practice" are exempt from notice and comment requirements. The action the Agency is taking in this document reverses certain amendments to the Environmental Appeals Board's procedural rules and replaces them with the prior regulatory text. These procedural revisions fall under the exemption provided in APA section 553(b)(3)(A), as did the rule originally establishing the EAB and its appeal procedures. 57 FR 5320, 5322 (February 13, 1992). Some of the changes in this rule affect the organization of the Agency as it pertains to the organization and function of the EAB, and some of the changes alter the procedures applicable to appeals submitted to the EAB for adjudication. With respect to the appeals process and procedures, this action does not alter the rights or interests of the parties who come before the Board; rather, it reinstates the prior process and procedures used by the Board to review the Agency decision being appealed. Accordingly, EPA is taking no comment on this action.

## **II. Background**

### *A. What Action Is the Agency Taking?*

The Agency is rescinding certain changes made to EPA's Environmental Appeals Board and its appeal process that were promulgated on August 21, 2020 (85 FR 51650) (hereafter "2020 EAB Rule" or "2020 amendments"). Specifically, the EPA is reinstating the regulatory

text at 40 CFR 1.25 and most of 40 CFR 124.19 that existed prior to the 2020 amendments. The 2020 EAB Rule is subject to review consistent with the Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” section 2(a) (January 20, 2021) (86 FR 7037, January 25, 2021). Based on that review, the Agency has determined that the 2020 EAB Rule adversely affects the administration of the Agency’s appeals process and procedures and, thus, rescission of the 2020 EAB Rule is warranted. This action does not, however, alter the revisions that the 2020 EAB Rule made to 40 CFR part 49 or 71, which made the permit appeal procedures in 40 CFR 124.19 applicable to permits issued to tribes in Indian Country under part 49 (for minor and non-attainment NSR permits) and to Title V permits issued under part 71. Applying the same appeal procedures to these types of permits makes the appeals process more consistent, efficient, and transparent.

The EAB was established by rule in 1992 as an impartial body, independent of other EPA components outside of the immediate Office of the Administrator, to conduct full and fair adjudications and to allow for a broader range of input into Agency decisions by the Administrator’s express delegation of authority. 57 FR 5320 (February 13, 1992). This rule reinstates the regulatory provisions related to the establishment and function of the EAB and the permit appeals process as they existed prior to the 2020 amendments. In doing so, the Administrator is ensuring that the EAB can continue to uphold the integrity of the Agency’s decisionmaking, including the advancement of environmental justice.

The 2020 EAB Rule altered regulatory text pertaining to EAB procedures governing permit appeals, which are informal adjudications under the Administrative Procedure Act. Specifically, the 2020 EAB Rule was intended to preclude the EAB’s review of discretionary Agency actions and to make the Board’s scope of review more akin to that of federal courts. To accomplish that goal, the 2020 EAB Rule removed regulatory text pertaining to the EAB’s review of challenges based on the permit issuer’s exercise of discretion, as well as the Board’s discretion to review important policy considerations. The changes adversely affected the Board’s

ability to review -- in the context of a permit appeal -- a permit issuer's compliance with and application of important EPA policies and Executive orders (85 FR 51652), such as Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 FR 7629 (February 16, 1994), which the Board has done in many prior cases. Additionally, the 2020 EAB Rule's stated aim of aligning the Board's standard of review with that of federal courts is not met by the 2020 EAB Rule, because the Administrative Procedure Act authorizes Federal courts to set aside any final agency action under review that is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. 706. By limiting the Board's review to clearly erroneous findings of fact and conclusions of law, and excluding the review of discretionary Agency action and compliance with EPA policies and Executive orders, the 2020 EAB Rule injected uncertainty with respect to the Board's ability to review acts or omissions of the exercise of Agency discretion (and with respect to the applicability of prior related precedent). The effect of the 2020 EAB Rule also conflicts with the efficient and effective functioning of the EAB to administratively review Agency action before it is final, irrespective of a Federal court's scope or standard of review, and to ensure that Agency components consistently comply with Agency policies in a manner that comports with exercising the delegated functions of the Administrator. As such, these changes present obstacles for the Board in ensuring the integrity of Agency decisionmaking where the decision involves discretionary agency action and may impede the advancement of important policies, such as environmental justice. For this reason, this rule rescinds the changes to the EAB's standard for review in permit appeals.

The 2020 EAB Rule also adversely affected other aspects of the process for permit appeals. To purportedly "streamline the permitting appeal process," the rule set deadlines for the EAB's review by imposing a 60-day requirement to issue permit decisions. The 2020 EAB Rule also restricted the number and length of extensions of time that parties may request. Given the wide range of issues and arguments raised in petitions for review by the EAB, these restrictions

are overly prescriptive. Briefing schedules, extensions of time, and even the time it takes to issue a decision are more effectively managed on a case-by-case basis after considering the nature and circumstances present in the case balanced with the resources and demands of the EAB. Existing EAB rules provide the Board the authority, in exercising its duties and responsibilities, to “do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal.” 40 CFR 124.19(n). The ability of a tribunal to manage its docket — including granting extensions, setting deadlines, and determining procedural requirements — is essential to its ability to provide an efficient, fair, and impartial adjudication. Removing the ability of the EAB to manage its caseload based on the wide range of circumstances that may be presented runs counter to those goals.

Additionally, the stated objective to “streamline” the permitting process in the 2020 EAB Rule was not well-supported. The EAB review process not only provides a meaningful opportunity for affected communities to have their concerns addressed, it also expedites the process of obtaining a final, valid permit by facilitating a process that is faster and more certain for the applicant. Permit appeals to the EAB are resolved within a reasonable timeframe and the overwhelming majority of EAB decisions resolve the dispute without the need for federal court litigation, which generally takes considerably longer. On average, very few EAB decisions are appealed to Federal court and very few of those have been overturned. Over the years the EAB has continually refined and altered its processes to reduce the amount of time it takes to effectively resolve an appeal and to make it easier for people to use the appeals process, including the use of electronic filing, making the EAB docket publicly accessible and EAB decisions publicly searchable, implementing word limits on briefs, streamlining procedures for participation in permit appeals, improving internal processes, and implementing the EAB’s highly successful Alternative Dispute Resolution process. The EAB has demonstrated a commitment to continuous improvement in the permit appeal process.

The 2020 EAB Rule also altered the deadline and page limit for Amicus participation.

Amicus parties in EAB cases can include impacted States, Tribes, and Municipalities (when they are not a petitioner or respondent in the appeal), trade associations, and – when a non-EPA authority is the permit issuer – the EPA’s Office of General Counsel. It is in the best interest of the appeals process to provide amicus parties with reasonable timeframes in which to file briefs in appeals, so long as the time allowed will not unduly interfere with the efficiency of the process. Requiring Amicus briefs to be submitted in all cases *before* the Permit Issuer responds to a Petition for Review, and limiting the length of such briefs to 15 pages, both of which the 2020 EAB Rule does, unnecessarily restricts the EAB’s consideration of amici participation in a manner that may preclude the EAB from receiving fully informative briefing of the issues on appeal and, as such, may complicate rather than streamline or improve the permitting appeal process.

The 2020 EAB Rule also removed the Board’s authority to decide on its own initiative, or *sua sponte*, to review any condition of a Resource Conservation and Recovery Act (RCRA), Underground Injection Control (UIC), National Pollutant Discharge Elimination System (NPDES), or Prevention of Significant Deterioration (PSD) permit decision reviewable under 40 CFR 124.19, even when that permit has not been appealed. Consistent with the delegated authority by the Administrator to review agency decisions, this final rule reinstates the Board’s *sua sponte* authority, which has been in place since the Board was established.

With respect to the function of the Board, the 2020 EAB Rule modified the EAB’s prior-existing delegation of authority by authorizing the EPA General Counsel, who frequently appears before the EAB in disputed matters as Counsel, or works closely with an EPA Region or EPA program office as “of Counsel,” to issue dispositive determinations on pending EAB matters. Specifically, the 2020 EAB Rule provides that the Administrator acting through the General Counsel can issue a dispositive legal interpretation in any matter pending before the EAB (including enforcement or permit matters) or on any issues addressed by the EAB. These revisions are inconsistent with the EAB’s original establishment and function and undermine the

transparency, fairness, and finality of EAB decisions. When the Board was established, the Administrator recognized the need to make clear that “the Administrator’s adjudicative authority and the Administrator’s enforcement authority (delegated to various Regional and Headquarters enforcement officers) are delegated to, and exercised by separate and distinct components of the Agency.” 57 FR 5322. For this reason, the rules expressly prohibit Board Members from being employed by the Office of General Counsel or any other office directly associated with matters that could come before the EAB. 40 CFR 1.25(e)(3). The EAB’s independence from the various component offices outside the immediate Office of the Administrator is a critical element of inspiring confidence in the fairness and transparency of the Agency’s appellate adjudication process. This includes independence from the Office of the General Counsel, which is not part of the immediate Office of the Administrator.

Additionally, administrative review by the EAB involves a review of the record of decision as it existed at the time the decision was made. A post-hoc interpretation of law that is issued while an appeal is pending, and that is binding on the EAB, injects confusion into the Agency decisionmaking process and conflicts with the EAB’s review of the Agency’s understanding or application of the law at the time the decision was made. Transparency and fairness in the review of Agency decisionmaking is better served by not injecting a newly issued interpretation of law from the Office of General Counsel while an appeal is pending before the Board. Additionally, because the Office of General Counsel is often counsel, “of counsel” or an amicus party in Board cases, the imposition of a new binding interpretation of law issued through the Office of General Counsel during the pendency of an appeal raises the very concerns that the EAB was established to address. Moreover, this modification was unnecessary because, among other reasons, a reconsideration process exists for EAB decisions and matters can be referred to the Administrator for decision. In sum, a legal interpretation binding on the EAB issued during the pendency of an appeal undermines the EAB’s exercise of the Administrator’s delegated adjudicative authority as well as confidence in the fairness of the process.



The 2020 EAB Rule also established a process for the Administrator to reverse the EAB's designation of a decision for publication. A decision designated for publication means the decision is slated to be reproduced in bound volumes of the *Environmental Administrative Decisions* and appear on the Board's website as a published decision. Practically speaking, re-designating a decision as unpublished does not alter the EAB's statutory obligation to publish *all* final decisions and orders on its website under 5 U.S.C. 552(a)(2)(A) (i.e., both published and unpublished final orders). The intent of the rule change, however, was not necessarily to affect which decisions are made available to the public; rather, the intent was to indicate to reviewing courts that only published EAB decisions may warrant deference. 85 FR 51653 (August 21, 2020) (noting in the preamble that "it is the express policy of the Agency that only published decisions of the EAB represent EPA's official, authoritative position with regard to the issues addressed in such decisions" and that the intent of the change is to "indicate to reviewing courts that only published EAB decisions may warrant deference"). As revised, the regulatory text added in the 2020 EAB Rule regarding decisions for publication neither determines which decisions will be made available to the public nor forecloses a reviewing court from choosing to afford deference to an unpublished decision. Whether a decision is categorized as "published" versus "unpublished" is also not determinative of whether a party will rely on a case or cite a case to the Board. Consistent with the foundational legal principle of *stare decisis*, the Board generally follows its own prior applications of law where the same factual and legal principles are presented. The use of a system of precedential decisions makes the decisional process more transparent and consistent for all, including the public. Given all of the above, the provision providing for the Administrator to determine whether a decision should be re-categorized as unpublished or not followed in future cases could negatively affect the transparency and consistency of EAB decisionmaking, and interfere with the independence and function of the EAB to issue final decisions as delegated by the Administrator, which again is fundamental to inspiring confidence in the fairness of the Agency's appellate adjudication process.

Finally, the 2020 EAB Rule set 12-year term limits for EAB judges to serve on the Board. When the Board was established, it was created as a “permanent body with continuing functions.” 57 FR 5320. For twenty-nine years, the EAB judges have been career employees and members of the Senior Executive Service (SES), governed by a specific statute implemented by the Office of Personnel Management (OPM), specifically 5 U.S.C. 3395. The EAB judge position has been classified as Career Reserved, which means that the position is filled by a career appointee and designated as such to ensure impartiality, and the public’s confidence in the impartiality, of the government. 5 CFR 214.402. The Career Reserved designation is particularly appropriate for positions, like this, that involve adjudication and appeals. *Id.* In addition, imposing a 12-year term limit is unnecessary given that the Administrator assigns and appoints career appointees to serve as EAB judges, and each judge acts on the express delegated authority of the Administrator and remains accountable to the Administrator. Further, pursuant to 3395 and 5 CFR 317.901, each judge, as a member of the SES, is subject to reassignment by the Administrator to any other SES position in the Agency for which he or she qualifies, if the Administrator so chooses. 5 U.S.C. 3395 (governing the reassignment or transfer of SES employees); 5 CFR 317.901 (setting forth procedures for effectuating SES reassignments or transfers). The added term limits neither expanded nor removed any authority that the Administrator has over the EAB judge positions. The Agency has benefited from judges who have served on the EAB for long terms because these judges have deep experience in EAB jurisprudence and provide important stability for the Board, as well as the Agency’s administrative jurisprudence. Further, although the 2020 EAB Rule set 12-year term limits, it applied those limits on a “rolling basis” to the current judges, where the most senior judge’s term expires three years from the effective date of the 2020 EAB Rule. 85 FR 51653. This “retroactive” application of the 12-year term limits to current judges conflicts with the “dignity and stature” that was originally intended for “the Agency’s highest adjudicative body.” 57 FR 5320. Potentially rotating in a new judge every three years (or even more often if vacancies

occur) could inject instability into the appeals process, may appear to politicize the position in a way that is antithetical to the career reserved designation, and does not serve the Agency's intent in creating the EAB as a specialized, impartial appellate Agency tribunal. Removing the term limits leaves in place the Administrator's authority to reassign any SES judge, consistent with relevant SES statutes and regulations, if the Administrator chooses.

In sum, by rescinding the 2020 EAB Rule and reverting the regulations pertaining to the EAB's function and process to the prior existing regulatory text, the Administrator is reaffirming the EAB's original function as an impartial body, independent of other EPA components, to conduct full and fair adjudications in the exercise of the Administrator's delegated authority. In modifying the Administrator's delegation of authority to the EAB, the 2020 EAB Rule weakened the administration of the Agency's appeals process and procedures. The reversion of the regulatory text will better safeguard the EAB's ability to efficiently and effectively manage the appeals process and ensure the integrity of Agency decisionmaking, advance environmental justice, and protect public health and the environment, in accordance with the mission of the Agency. The Agency intends to further consider the advisability of future revisions to the EAB's procedural rules to incorporate any other housekeeping revisions needed for efficiently and effectively processing appeals.

### **III. Statutory and Executive Order Reviews**

#### *A. Executive Orders 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is exempt from review by the Office of Management and Budget (OMB) because it is limited to agency organization, management or personnel matters.

#### *B. Paperwork Reduction Act (PRA)*

This action does not contain any information collection activities and therefore does not impose an information collection burden under the PRA.

*C. Regulatory Flexibility Act (RFA)*

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This rule pertains to agency management or personnel, which the EPA expressly exempts from notice and comment rulemaking requirements under 5 U.S.C. 553(a)(2).

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1536, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use*

This action is not a “significant energy action” because it is not likely to have a

significant adverse effect on the supply, distribution or use of energy.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.*

This action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

*K. Congressional Review Act (CRA)*

This rule is exempt from the CRA because it is a rule relating to agency management or personnel; and is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties.

**List of Subjects**

*40 CFR Part 1*

Environmental protection, Organization and functions (Government agencies).

*40 CFR Part 124*

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

**Michael S. Regan,**

Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR parts 1 and 124 as follows:

**PART 1 – STATEMENT OF ORGANIZATION AND GENERAL INFORMATION**

1. The authority citation for part 1 continues to read as follows:

**Authority:** 5 U.S.C. 552; Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (July 9, 1970).

2. Amend §1.25 by:

- a. Revising paragraph (e)(2);
- b. Removing paragraphs (e)(3) and (5); and
- c. Redesignating paragraph (e)(4) as paragraph (e)(3).

The revision reads as follows:

**§1.25 Staff offices.**

\* \* \* \* \*

(e) \* \* \*

(2) *Functions.* The Environmental Appeals Board shall exercise any authority expressly delegated to it in this title. With respect to any matter for which authority has not been expressly delegated to the Environmental Appeals Board, the Environmental Appeals Board shall, at the Administrator's request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate. In performing its functions, the Environmental Appeals Board may consult with any EPA employee concerning any matter governed by the rules set forth in this title, provided such consultation does not violate applicable *ex parte* rules in this title.

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**PART 124 – PROCEDURES FOR DECISIONMAKING**

3. The authority citation for part 124 continues to read as follows:

**Authority:** Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

4. Amend § 124.19 by:

- a. Revising paragraphs (a)(4), (e), (g), and (l);
- b. Removing paragraph (m) and redesignating paragraphs (n) through (p) as paragraphs (m) through (o), respectively; and
- c. Adding a new paragraph (p).

The revisions and addition read as follows:

**§ 124.19 Appeal of RCRA, UIC, NPDES and PSD Permits.**

(a) \* \* \*

(4) *Petition contents.* (i) In addition to meeting the requirements in paragraph (d) of this section, a petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. The petition must demonstrate that each challenge to the permit decision is based on:

(A) A finding of fact or conclusion of law that is clearly erroneous; or

(B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.

(ii) Petitioners must demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by § 124.13. For each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in § 124.13. Additionally, if the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to § 124.17, then petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review.

\* \* \* \* \*

(e) *Participation by amicus curiae.* Any interested person may file an amicus brief in any

appeal pending before the Environmental Appeals Board under this section. The deadline for filing such brief is 15 days after the filing of the response brief, except that amicus briefs in PSD or other new source permit appeals must be filed within 21 days after the filing of the petition. Amicus briefs must comply with all procedural requirements of this section.

\* \* \* \* \*

(g) *Timing of motions for extension of time.* Parties must file motions for extensions of time sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order.

\* \* \* \* \*

(1) *Final disposition and judicial review.* (1) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of the final agency action.

(2) For purposes of judicial review under the appropriate Act, final agency action on a permit occurs when agency review procedures under this section are exhausted and the Regional Administrator subsequently issues a final permit decision under this paragraph (1). A final permit decision must be issued by the Regional Administrator:

(i) When the Environmental Appeals Board issues notice to the parties that the petition for review has been denied;

(ii) When the Environmental Appeals Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(3) The Regional Administrator must promptly publish notice of any final agency action in the Federal Register regarding the following permits:



- (i) PSD permits;
- (ii) Outer continental shelf permits issued under 40 CFR part 55;
- (iii) Federal Title V operating permits issued under 40 CFR part 71;
- (iv) Acid Rain permits appealed under 40 CFR part 78;
- (v) Tribal Major Non-Attainment NSR permits issued under 40 CFR 49.166 through 49.173; and
- (vi) Tribal Minor NSR permits issued under 40 CFR 49.151 through 49.161.

\* \* \* \* \*

(p) *Authority to initiate review.* The Environmental Appeals Board also may decide on its own initiative to review any condition of any RCRA, UIC, NPDES, or PSD permit decision issued under this part for which review is available under paragraph (a) of this section. The Environmental Appeals Board must act under this paragraph (p) within 30 days of the service date of notice of the Regional Administrator's action.

[FR Doc. 2021-12291 Filed: 6/10/2021 8:45 am; Publication Date: 6/11/2021]